CHAN HON FAH

v.

KHOO HOON ANN

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[SUIT NO. 209 OF 1983]
28 MARCH 1986

TORT: *Negligence - Collision between motorcycle and motor car - Travelling in opposite directions - Car came downhill and encroached into motor cycle's path - Injuries sustained - Fracture of right arm and right leg - 5 cm shortening of right leg.*

The plaintiff who was riding a motor cycle collided into a car driven by the defendant which was coming from the opposite direction. The plaintiff's version was that the defendant's car collided into him while he was on the left side of the road. The car came downhill after negotiating a bend and he was going uphill at 35 to 40 kilometre per hour. The defendant's version was that the motorcycle encroached into his path and collided into his car. He was travelling at 30 to 40 kilometre per hour. The motor cycle was thrown back to its side of the road after the impact. The police witness stated both vehicles were found on the plaintiff's side of the road. From the sketch plan, the front of the car was at a right angle to the inner edge of the grass verge. The plaintiff sustained the following injuries; fractures of the right arm and right leg and 5 cm shortening of the right leg. He was a sub-contractor for painting and he earned between RM800 to RM1,000 per month. He was 23 years.

Held:

[1] The plaintiff's version of the accident was accepted. The defendant was liable for the accident.

[2] General damages in the sum of RM35,000 was awarded for the injuries sustained. Interest at 8% p.a. was awarded on the said sum from the date of service of the writ to the date of satisfaction.

[3] For pre-trial loss of earnings RM800 per month was awarded from the date of accident to 30 September 1983 and at RM440 per month from 1 October 1983 to date of judgment. Interest at 4% per annum was awarded on the said sum from the date of accident to the date of judgment and thereafter at 8% p.a. to the date of realisation.

[4] General damages for loss of future earnings at RM260 per month for 24 years purchase was awarded. No interest was awarded on the said sum.

[Judgment to the plaintiff with costs.]

Case referred to:
Joginder Kaur v. Malayan Banking Ltd. [1971] 1 MLJ 98

For the plaintiff - Toh Chin Chong; M/s. Murphy & Dunbar, Seremban
For the defendant - Ajit Singh Gill; M/s. Vohrah & Tan Chee Lan, Melaka

JUDGMENT

Peh Swee Chin J:

This was an accident between the plaintiff, riding a motor cycle and the defendant, driving a motor car, in respect of which judgment was given for the plaintiff with costs, and the defendant has now appealed from such judgment.

The plaintiff, aged 23, at the time of trial, was riding the motor cycle to Bahau from Ladang Geddes, on his way home from work. He said to the effect that the defendant's car, coming from his opposite direction, knocked into him while he was on his left side of the road. The front off-side of the car came in contact with his right arm and leg and collided into the off-side of his motor cycle. He could not avoid the accident though he tried his best. The road was dry and visibility was good. There was a bend at the place of accident and the car came towards him downhill after negotiating this bend. He was going uphill at the time. He was driving at 35 to 40 kilometers per hour. It will be clear that what the plaintiff had alleged was encroachment onto plaintiff's path by the defendant's car.

In cross-examination, the plaintiff denied having raced on the motor cycle with two co-workers from the same plantation. He denied in effect that he was trying to cut corner at the bend and that it was the plaintiff who encroached onto the path of the defendant. He explained that he did not mention the encroachment in his police report because he was not very conscious at the time when the report being taken from him a day after the accident in the hospital. He denied that it was the defendant who was going uphill. He agreed with the contents of the police report except in regard to the mention of "left arm and leg", which should have been right arm and right leg.

The defendant aged 47 at the time of trial, said to the effect that an oncoming motor cycle collided into the front part of his car. He was on his correct side of the road when he first saw the motor cycle, and he was travelling at 30 to 40 kilometers per hour. He was then 7 or 8 ft. away from the motor cycle. At that time also, the motor cycle had already encroached onto his half of the road. He then jammed on his brake and despite this, the motor cycle knocked into the front off-side of the car. The motor cycle was thrown (back) to its side of the road after the impact. After the impact, the front off-side tyre of his car had a puncture and it could not move any more. The impact took place on his half of the road. He saw two friends of the plaintiff who arrived at the scene about 10 to 15 minutes after the collision. Plaintiff was looking back at his two friends before the accident. He was carrying an old man of 81 years sitting beside him on the way back from a clinic in Bahau. He would not endanger the safety of the old man by driving fast.

He said the motor cycle was coming fast but he did not mention it in his own report. He did not agree that his own speed of 30 - 40 km.p.h. could not have caused any brake mark. He said that the sick old man of 81 was in fact an old woman whose name he did not know. He saw the old woman whom he knew at the road side and he took pity on her and gave her a lift to the clinic. He denied that the plaintiff had not encroached onto his path though such encroachment was not mentioned in his report.

The investigation officer called by the plaintiff, said to the effect, that the front windscreen of the car was smashed, its front off-side tyre deflated, its front off-side headlamp smashed; front off-side bumper and mudguard dented. The rim of the motor cycle's front wheel was bent, its front tyre and tube having come off; the off-side engine cover was broken; its front number plate was missing, its rear number plate broken. The off-side windshield was damaged; its off-side exhaust pipe was dented. All signal lights front and rear were broken. Both vehicles were on the left side of the road as one faced Bahau. At the scene, one would travel downhill from the direction of Bahau. In cross-examination he agreed to the effect that at the point where the brake mark was, one would go downhill but shortly after that one would go uphill.

The sketch plan showed both vehicles to be on the left edge of the road as one faced Bahau, i.e. on the plaintiff's correct side of the road. Both vehicles were partly on the grass verge and partly on the metalled road. There was a pair of brake marks the length of which was

not measured; they consisted of two close parallel lines, apparently made by a fairly broad tyre. They appeared to veer towards the left side of the road as one faced Bahau. The front of the car appeared to be resting at almost right angle to the inner edge of the grass verge.

Having seen both the plaintiff and the defendant in the witness box, the plaintiff had impressed me as a witness of truth, but the same could not be said of the defendant. I accepted the evidence of plaintiff as against the evidence of the defendant especially in regard to the encroachment on the part of the defendant. Precaution was taken to test the story of the plaintiff which I believed, against the sketch plan, medical evidence, evidence of damage to both vehicles etc. The sketch plan was not equally consistent with both stories but was more consistent, in my view, with the story of the plaintiff than that of defendant, e.g. both vehicles on the edge of the road on the plaintiff's correct side; the veering of the brake marks to their wrong side. The blood stain was near the motor cycle of the plaintiff. The plaintiff sustained fractures of right arm and right leg. The damage to the motor cycle, from front to the rear on its off-side though more damage in front.

I therefore found defendant wholly to blame.

I accepted the evidence of plaintiff that he was a sub-contractor for painting before the accident, earning between RM800 to RM1,000 per month. I assessed his earnings at RM800 per month on the sub-contract he was engaged on just before the accident. Looking at his very serious injuries, I awarded, for pre-trial total loss of earning, RM800 per month from the date of accident to only 30 September 1983. After 30 September 1983, he could have resumed his work as a painter earning RM440 per month at RM20 per day for 22 days in a month, bearing in mind, the plaintiff's duty to mitigate his losses. The pre-trial partial loss was not however RM800 less by RM440 but RM700 less by RM440. I reduced the sum of RM800 per month to RM700 per month to reflect reduced earnings during the period in between two different sub-contracts for painting jobs, as such contracts did not run forever, and were not all that easy to come by. For pre-trial partial loss, I therefore allowed a sum of RM260 per month from 1 October 1983 to date of judgment. I also allowed RM75 incurred in connection with the excess clause of the motor cycle's insurance policy and RM300 for travelling expenses. All the sums allowed above were entitled to interest at the rate of 4% per annum from the date of accident to date of judgment and thereafter at 8% per annum to date of realisation.

I awarded a total sum of RM35,000 for compound fractures of plaintiff's right femur and right tibia and fibula and closed fracture of right humerus and the residual disabilities including, in particular, 5 c.m. shortening of the right leg; I had preferred Dr. Silva's measurement of 5 c.m. to the measurement of 6 c.m. by the other Surgeon. I also awarded interest at the rate of 8% per annum from the date of service of writ to date of satisfaction.

Learned Counsel for defendant contended that income tax should be deducted from damages. Having regard to amounts of his earnings, there would have been following deductions from them *viz.*, personal allowable annual deduction of RM4,000; RM1,000 deduction for dependant relatives (if any); RM2,000 for wife (if any); sundry business deductable expenses such as petrol and cost of maintenance for motor cycle, depreciation for the value of motor cycle; life insurance premium (if any); allowance for children (if any); and on the balance of probabilities, I found that at the end of it all, he would not have to pay income tax, and therefore income tax need not in effect enter into the assessment of the quantum. His failure to declare his income to the Department of Inland Revenue would not be an issue in the instant case.

Finally, for the loss of future earnings, I adopted the figure of RM260 also as the basis for the purpose of arriving at the analogical figure for annuity as damages would be assessed by means of annuity table, I adopted a figure of 24 as the relevant number of years' purchase and in arriving at the figure, I derived assistance from the Federal Court case of *Joginder Kaur v. Malayan Banking Ltd.* [1971] 1 MLJ 98, 102, where the deceased was aged 35 at the time of death and 12 years' purchase was awarded. In the instant case, the plaintiff was 23, and I did not think it was unreasonable to award 24 years' purchase. I further directed that the loss of future earnings would carry no interest.

Also found at [1988] 1 CLJ 791